WEE CHOO KEONG

v.

LEE CHONG MENG & ANOR

FEDERAL COURT, KUALA LUMPUR
PEH SWEE CHIN FCJ
ZAKARIA YATIM FCJ
SHAIK DAUD ISMAIL JCA
[CIVIL APPEAL NO: 08-19-1996 (W)]
14 JANUARY 1998

ELECTION: *Petition - Election judge - Whether amenable to an order of certiorari - Election court - Whether an inferior court - Whether election court is a High Court - Election Offences Act 1954, s. 33(1)*

CONSTITUTIONAL LAW: *Courts - High Court - Jurisdiction - Whether limited - Whether every order made competent - Whether High Court capable of making an error going to its jurisdiction - Whether High Court may issue certiorari against itself - Whether election court is a High Court*

ADMINISTRATIVE LAW: *Exercise of judicial functions - Judicial review - Errors of law made by High Court - Whether may be reviewed by another judge of the High Court - Whether can only be corrected by appeal to appellate courts*

This was an application to the Federal Court for leave to appeal against a decision of the Court of Appeal upholding a decision of the High Court in dismissing the applicant's application for an order of *certiorari* to quash a decision of an election judge. The applicant had earlier been elected as a Member of Parliament but, upon an election petition filed against him by the 1st respondent, was disqualified and unseated by the election judge. The 1st respondent was, thereupon, declared as the Member of Parliament for the constituency concerned. The predominant issue of law raised in the instant application for leave was whether an election judge is amenable to an order of *certiorari*, an issue on which both the courts below had ruled in the negative.

Held:
Per Peh Swee Chin FCJ

[1] The court in which an election judge sits is **not** an inferior court or a tribunal or a statutory authority against which an order of *certiorari* may be issued. This interpretation is supported by s. 33(1) of the Election Offences Act 1954 ('the EOA') which provides, *inter alia*, for election petitions to be tried by the Chief Judge of the High Court or by a judge of the High Court nominated by the Chief Judge.

[1a] A significant pointer as regards the status of an election court lies in art. 118 of the Federal Constitution which provides that an election may only be called in question by way of an election petition presented to the High Court. Section 2 of the EOA further defines an 'election judge' as the Chief Judge or any judge nominated by the Chief Judge.

[1b] An election court is, in fact, the High Court, and the High Court **cannot** issue the prerogative order of *certiorari* against itself.

[2] The High Court is a superior court and a court of unlimited jurisdiction in the course of contentious litigation. Every order made by a superior court must be regarded as an order of competent jurisdiction. Competent jurisdiction means the right to exercise legal authority, and the right to exercise the legal authority of entering on the enquiry in question to make any order.

[2a] There is simply **no** room for the High Court to make an error going to its jurisdiction. Hence, any judicial review of a decision of the High Court on account of it being *ultra vires* would be an affront to common sense. Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only. If the High Court makes an error, it may be corrected by means of an appeal to the appellate courts but **not** by way of judicial review by another judge of the High Court.

[Application for leave dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Ini adalah permohonan kepada Mahkamah Persekutuan untuk diberikan kebenaran untuk merayu terhadap keputusan Mahkamah Rayuan yang mengesahkan keputusan Mahkamah Tinggi menolak permohonan pemohon untuk mendapatkan perintah *certiorari* bagi membatalkan keputusan hakim pilihanraya. Pemohon sebelum ini telah dipilih sebagai seorang Ahli Parlimen, tetapi pemilihannya telah diisytiharkan sebagai tidak sah dan batal oleh hakim

pilihanraya ekoran suatu petisyen pilihanraya yang difailkan oleh responden pertama. Responden pertama, berikut keputusan tersebut, telah diisytiharkan sebagai Ahli Parlimen bagi kawasan pilihanraya berkenaan. Isu undang-undang yang predominan yang timbul dalam permohonan untuk kebenaran ini ialah samada hakim pilihanraya tertakluk kepada perintah *certiorari*, iaitu suatu isu di mana kedua-dua mahkamah di bawah telah pun memutuskan secara negatif.

Diputuskan:
Oleh Peh Swee Chin HMP

[1] Mahkamah di mana hakim pilihanraya bersidang bukanlah suatu mahkamah bawahan atau suatu tribunal ataupun suatu pihak berkuasa terhadap mana satu perintah *certiorari* boleh dikeluarkan. Ini disokong oleh s. 33(1) Akta Kesalahan Pilihanraya 1954 ('AKP') yang antara lain memperuntukkan agar petisyen pilihanraya dibicarakan oleh Hakim Besar Mahkamah Tinggi atau oleh seorang hakim Mahkamah Tinggi yang dilantik oleh Hakim Besar.

[1a] Satu petunjuk penting berkaitan dengan status mahkamah pilihanraya dapat dilihat dalam fasal 118 Perlembagaan Persekutuan yang memperuntukkan bahawa sesuatu pilihanraya hanya boleh dipersoalkan melalui petisyen pilihanraya yang dikemukakan kepada Mahkamah Tinggi. Seksyen 2 AKP juga mentakrifkan seorang 'hakim pilihanraya' sebagai Hakim Besar atau pun sebarang hakim yang dilantik oleh Hakim Besar.

[1b] Sebuah mahkamah pilihanraya adalah sebenarnya sebuah Mahkamah Tinggi, dan Mahkamah Tinggi tidak boleh mengeluarkan perintah prerogatif *certiorari* terhadap dirinya sendirinya.

[2] Mahkamah Tinggi adalah sebuah mahkamah atasan dan juga sebuah mahkamah yang mempunyai bidangkuasa yang tidak terhad dalam urusannya dengan tuntutan-tuntutan yang berselisih. Setiap perintah yang dibuat oleh mahkamah atasan mestilah dilihat sebagai suatu perintah oleh bidang kuasa yang berkompeten. Bidang kuasa yang berkompeten bermakna hak untuk melaksanakan kuasa undang-undang dan hak untuk melaksanakan kuasa undang-undang untuk memulakan kaji siasat yang berkenaan untuk membuat apa jua keputusan.

[2a] Tidak ada ruang sama sekali bagi Mahkamah Tinggi untuk membuat satu kesilapan yang menyentuh bidang kuasanya. Oleh yang demikian, sebarang kajian semula kahakiman terhadap sesuatu keputusan Mahkamah Tinggi atas alasan bahawa ianya *ultra vires*, adalah

sebenarnya menyanggah akal budi. Kajian semula kehakiman memang dibolehkan sebagai remedi tetapi hanya terhadap kesilapan undang-undang yang dibuat oleh mahkamah-mahkamah bawahan dan tribunal-tribunal sahaja. Sekiranya kesilapan itu dibuat oleh Mahkamah Tinggi, ianya boleh dibetulkan dengan cara rayuan kepada mahkamah-mahkamah rayuan tetapi bukan dengan cara kajian semula kehakiman oleh seorang hakim Mahkamah Tinggi yang lain.

[Permohonan untuk kebenaran ditolak].

Cases referred to:

Anisminic Ltd v. Foreign Compensation Commission [1969] 29 AC 147 ***(cit)***
Ignatius Stephen Malanjum v. Election Judge of Sabah & Anor (Supreme Court Civil Appeal No: 03-42-89) ***(foll)***
Isaacs v. Roberson [1985] AC 97 ***(refd)***
Puah Bee Hong & Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor [1944] 2 MLJ 601 ***(refd)***
Racal Communications Ltd [1981] 374 ***(foll)***
Tunku Abdullah v. Ali Amberaan [1971] 1 MLJ 25 ***(aff)***

Legislation referred to:

Courts of Judicature Act 1964, s. 24
Election Offences Act 1954, ss. 2, 33(1)
Federal Constitution, art. 118

[Appeal from Court of Appeal; Civil Appeal No: W-01-149-1995]

For the applicant - Sulaiman Abdullah; M/s Zain & Co
For the respondents - Zaitun Zawiyah Putih SFC & Dato' Ahmad Zaki Husin SFC

JUDGMENT

Peh Swee Chin FCJ:

We have earlier dismissed the application of the applicant for leave to appeal to the Federal Court and indicated we would give our grounds of judgment later. We now hereby do so. The applicant is hereafter referred to as the applicant for leave.

The leave sought for but refused related to an intended appeal against a decision of the Court of Appeal dated 29 February 1996 which had upheld the High Court's decision in dismissing an application there by the applicant herein for leave there to apply for an order of *certiorari* to quash an earlier decision of an election judge. A brief account of the background of this matter would be necessary.

The applicant was earlier elected at the last general election as a Member of Parliament for the constituency of Bukit Bintang but in an election petition filed subsequently by his unsuccessful opponent against the applicant for leave, the latter was disqualified and unseated by the election judge who, instead, declared that one Lee Chong Meng, the said opponent as duly elected Member of Parliament in place of the applicant for leave.

The applicant for leave, being unable to appeal against such decision, did not appeal and instead, applied to the High Court for leave to apply for an order of *certiorari* to quash the decision of the election judge. That a final order of the election judge is not appealable has been long settled, vide the Federal Court decision of *Tunku Abdullah v. Ali Amberaan* [1971] 1 MLJ 25 in which a number of prior and connected decisions were considered and discussed before such decision.

The applicant for leave was not successful in the High Court in the matter of applying for leave to apply for an order of *certiorari* and neither was he successful in the Court of Appeal, hence the instant application before us.

All the questions of law that were raised in the instant case were overshadowed by a predominant issue as whether an election judge was amenable to an order of *certiorari*. All the judges in the Court of Appeal were unanimous that an election judge was not so amenable. They all relied also on a brief and unreported oral judgement of the Supreme Court in Supreme Court Civil Appeal no. 03-42~89 viz *Ignatius Stephen Malanjum v. Election Judge, Sabah and Anor*. in which it was held that the court in the election judge sat was not an inferior court against which an order of *certiorari* could be issued, after considering s. 33(1) of the Election Offences Act 1954 which provided for any election petition to be tried by the Chief Judge of the High Court or by a judge of the High Court to be nominated by the Chief Judge.

We were asked to depart from the unreported decision by arguments that the election judge was erroneous for various reasons for unseating the applicant for leave and consequently a basic feature of the Federal Constitution was breached, the basic feature being that Members of Parliament must be duly elected, (in other words the present Member of Parliament in question was not), notwithstanding the ratio in the said unreported judgment which learned counsel for the applicant for leave described with candour was a "formidable obstacle" in the instant application. We thought it was an immovable one. We decided that we should not depart from the said ratio after due consideration for the following reasons.

It is our view that the court in which the election judge sits on hearing an election petition under the Election Offences Act 1954 (hereafter called the said Act) is not an inferior court or any statutory authority or tribunal which is amenable to an order of *certiorari*. Prerogative orders cannot be issued by the High Court against an election court which is not an inferior court for the following reasons.

Inter alia, this is because s. 33 of the said Act provides that an election petition should be heard by the Chief Judge of the High Court or a judge of the High Court nominated by the former; that any failure of a witness to attend court by an order of the election judge would make such a person "guilty of contempt of court" and that any High Court judge can deal with any interlocutory matters of the election petition, even though apparently he is not so nominated by the Chief Judge. Such election petition has not been known to have been filed anywhere else except in the High Court like the election petition in which in the instant application for leave was concerned. The election petition immediately concerned here was also entitled:

Dalam Mahkamah Tinggi di Kuala Lumpur

(Bahagian Rayuan Dan Kuasa-kuasa Khas) pada Wilayah

Persekutuan Malaysia

Petisyen Pilihanraya No. PP.3-95.

Article 118 of the Federal Constitution provides that an election can only be called in question by an election petition presented to "the High Court". High Court is the designated court for an election judge to sit in. This is by far the most significant pointer as regards the status of an election court. Yet another strong pointer is in the definition section (s. 2) of the said Act when it defines "election judge" as the Chief Judge or any judge nominated by the Chief Judge.

Further, the Courts of Judicature Act 1964 sets out jurisdiction of the High Court and its s. 24 deals with civil jurisdiction specifically in regard to divorce, bankruptcy, companies, probate of will etc. But it does not mention election petitions. Article 118 of the Federal Constitution in our view, seems to provide the High Court with this additional specific jurisdiction not mentioned in the said Act.

We are of the view that the election court is in fact, the High Court

Having come to this conclusion, to accede to the contention of learned counsel for the applicant for leave would be tantamount to accepting the proposition that the High Court could issue a prerogative order of *certiorari* against itself

since the circumstances in the instant case could not but amount to the same proposition just mentioned. The unacceptability of the said proposition can be further revealed below.

Judicial review is always conducted by the High Court, which is the launching pad for it. It is based on the primary and original basis of doctrine of *ultra vires* ie, the doctrine of lack or excess of jurisdiction. This doctrine has of course been prodigiously expanded and consolidated by the decision of the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 29 AC 147, the case of administrative law par excellence.

Speaking of this doctrine, a High Court (just like our two High Courts), is a superior court, and a High Court was described by Lord Diplock as "a court of unlimited jurisdiction in the course of contentious litigation" in *Issacs v. Robertson* [1985] AC 97, 103 and for this reason, as stated by the Supreme Court in *Puah Bee Hong and Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur and Anor* [1944] 2 MLJ 601, 611, "every order made by a superior court must be regarded as an order of competent jurisdiction". Such competent jurisdiction means the right to exercise legal authority and at any rate the right to exercise the legal authority of entering on the enquiry in question to make any order.

That being so, any judicial review of a High Court's decision on the ground of lack or excess of jurisdiction would be, quite apart from anything else, to borrow an expression from Lord Hailsham in some other unrelated case, an affront to common sense. If the High Court makes any error, it could be corrected by the appellate courts in the normal way but not by way of judicial review by another judge of the High Court. We cannot put it in a better way than Lord Diplock in the *Racal Communications Ltd.* [1981] 374, 384 when his Lordship said:

> The High Court is not a court of limited jurisdiction and its constitutional role includes the interpretation of written laws. There is thus no room for the inference that Parliament did not intend the High Court or the judge of the High Court acting in his judicial capacity to be entitled and, indeed, required to construe the words of the statute by which the question submitted to his decision was defined. There is simply no room for error going to his jurisdiction, nor, as is conceded by counsel for the respondent, is there any room for judicial review. Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only. Mistakes of law made by judges of High Court acting in their capacity as such can be corrected only by means of appeal to an appellate court; and if; as in the instant case, the statute provides that the judges's decision shall not be appealable, they cannot be corrected at all.

Thus, the High Court and the Court of Appeal were right in refusing the application for leave to apply for an order of *certiorari* to quash the decision of the election judge as they did not have the jurisdiction to consider in the first place whether the election judge's decision was right or wrong. Since this was the ultimate or the real reason on which their decisions depended, any other legal arguments advanced by the applicant for leave on any other reason would be academic and even irrelevant.

We therefore dismissed the application for leave with costs.

Reported by Gan Peng Chiang